Supreme Court, U.S.
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94-78 JUL 11 1994

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

KATHLEEN ASHER
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE CONFLICT AMONG JURISDICTIONS IN THE NATION REGARDING WHETHER, WHERE THE POLICE, IN EXECUTING A VALID SEARCH WARRANT, ARE HELD TO HAVE "FAILED" TO DELAY ENTRY INTO THE DWELLING AFTER HAVING ANNOUNCED THEIR PRESENCE AND THEIR PURPOSE FOR A PERIOD OF TIME SUFFICIENT TO ALLOW A PERSON IN THE ROOM FURTHEST FROM THE DOOR TIME TO ANSWER, THIS "FAILURE" RENDERS THE EXECUTION OF THE WARRANT AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

IF A KNOCK AND ANNOUNCE "FAILURE DOES VIOLATE THE FOURTH AMENDMENT, THEN DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE A STATE COURT TO EXCLUDE EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, AND DURING A SEARCH OF PROPER SCOPE, SIMPLY BECAUSE THE POLICE WAITED AN INSUFFICIENT PERIOD OF TIME BEFORE ENTERING THE PREMISES?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and Appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, issued February 22, 1994, leave denied by the Michigan Supreme Court on June 21, 1994, one justice dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 203 Mich App 621 (1994), and is appended as Appendix A. The order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on February 22, 1994. The Michigan Supreme Court denied discretionary appeal, with one justice dissenting from the denial, on June 21, 1994. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the People to be secure in their persons, houses, papers, and effects, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent Kathleen Asher was charged with possession with intent to deliver marijuana, and filed a motion to suppress.

At the hearing Officer Greg Brandemihl for the City of Romulus testified to executing a search warrant at the residence of 15065 Pondway in the City of Romulus (R, 3). He heard the first officer of the team knock on the door, and several of the officers yelled "police officer." Entry was made after about 5 seconds (T, 4). Before executing the search warrant a surveillance was undertaken, revealing a number of people who came and went from the house, remaining only a moment or two. From his experience, the officer believed this activity consistent with narcotic trafficking from the residence (R, 5). It

was also the officer's experience that when executing search warrants for drugs weapons were usually present in the premises (R, 6).

On both direct and cross-examination the officer testified that he heard nothing in the premises prior to entry being forced (R, 7). Basing the decision on People v Polidori, 190 Mich 673 (1991), the trial judge found a violation of the knock and announce requirements, suppressed the evidence, and dismissed the case.

On appeal the majority of the Court of Appeals of Michigan held that under the facts the knock and announce statute was violated. The majority also held that Polidori's holding that a violation of the knock and announce statute is also ipso facto a violation of the Fourth Amendment's reasonableness requirement, requiring

suppression as a remedy, governed the case, and that the panel was required to follow that holding under Michigan's conflict resolution rule. The majority stated that were it not for the order, it would not have found a constitutional violation, and would not have suppressed the evidence. The dissenting opinion took the view that the majority had read Polidori too broadly, found that the execution of the warrant was not unreasonable, and would not have suppressed even in light of Polidori.

On June 21, 1994, the Michigan Supreme Court denied leave to appeal, with one justice dissenting.

REASONS FOR GRANTING THE WRIT

The State submits that the question of the application of the Fourth Amendment to the manner of execution of a search warrant, where the question does not go to whether the scope of the search has been confined properly to those areas within the named premises where the items sought could reasonable be expected to be, but rather to the timing of the search, the search and discovery of the items named in the warrant being proper in all other respects, raises an issue which needs resolution. The Michigan Court of Appeals has held that whenever the police, armed with a valid search warrant, and after having conducted a perfectly valid search, are determined to have entered the premises too quickly after knocking and announcing their presence and purpose to allow a person who might be in the room furthest from the door to answer,

the search itself becomes unreasonable under the Fourth Amendment, and the result which the Constitution then mandates is the exclusion of the evidence (the panel here reached these conclusions reluctantly, being compelled to do so by a prior decision and a state rule regarding conflicts in the state Court of Appeals). These holdings are mistaken, and important.

First, a failure to await, after knocking and announcing, until a person in the room furthest from the door could answer, does not, properly viewed, raise a Fourth Amendment issue. Very recently the Wisconsin Supreme Court in State v Stevens, 511 NW2d 591 (Wis., 1994) held, with regard to the execution of search warrants for drugs, that the knock and announce requirement, which is of common law rather than statutory origin in Wisconsin, is not of Fourth Amendment dimension, so that a

violation is not a constitutional violation (that court also holding that compliance is excused by exigent circumstances whenever a warrant for drugs is executed).

Michigan and Wisconsin, at the very least, then, disagree on the constitutional basis of the knock and announce requirement. Moreover, in United States v Mueller, 902 F2d 336 (CA 5, 1990) it is stated that violations of the federal "knock-and-announce" statute are also violations of the Fourth Amendment, whereas in Commonwealth v Goggin, 587 NE2d 785 (Mass, 1992) it is stated that the rule is a common law one which is not constitutionally compelled. See also Commonwealth v Chambers, 598 A2d 539 (PA, 1991). Thousands of search warrants are executed annually in all of the states as well as by federal officials, and all have some form of knock and announce

requirement; the issue of whether the timing of the entry itself raises a constitutional issue needs resolution by this Court.

Moreover, the application of an exclusionary remedy in this situation, even if the timing of entry raises a Fourth Amendment issue, is mistaken.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after

having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply should not have occurred at all. In the first, the entry into the dwelling should never have occurred; in the second, the search of certain places within the dwelling should never have occurred. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it was--the police had a right under law to make it. Was the seizure of property appropriate? Surely it was--the police had a right under law to

seize it. Does employing the same "remedy" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely not. Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does this make sense. These violations are simply different in kind, and, most respectfully, petitioner submits that it is myopic to treat them as though they were no different at all.[1] As Chief Justice

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1. Petitioner would point out that this Court's guidance is also needed in that most jurisdictions, though not all, have failed to distinguish between timing errors and searches which should not have occurred. Cf. State v Willis, 294 SE2d 330 (NC, 1982), aff'd 298 SE2d 388 (NC, 1983), and State v Tweed, 663 P2d 38 (Oregon, 1985), among numerous others.

Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent.....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." Terry v Ohio, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Finally, Petitioner would note that on May 31, 1994, in Arizona v Evans, 55 Cr L 3057, this Court granted certiorari on the issue of whether an exclusionary remedy must be applied to evidence obtained during a search incident to an arrest where that arrest was based on an erroneous computer record which failed to reflect that the warrant had been quashed. Petitioner submits that the Fourth Amendment and exclusionary rule issues presented here are

also of significance to the Nation, again given the tremendous number of warrants which are executed annually, and that knock and announce requirements exist nationwide.

CONCLUSION

WHEREFORE, Petitioner respectfully submits that plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

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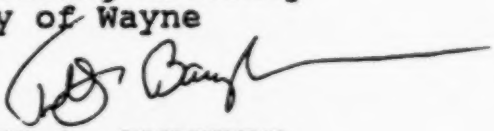
County of Wayne



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APPENDIX A: COURT OF APPEALS OPINION

PEOPLE V ASHER

DOCKET NO. 158306. Submitted July 7, 1993 at Detroit. Decided February 22, 1994, at 9:00 a.m.

Before: SAWYER, P.J., AND WEAVER and H.R. GAGE, JJ.

SAWYER, P.J. The people appeal from an order granting defendant's motion to suppress evidence, which resulted in the dismissal of charges against defendant of possession with intent to deliver marijuana. MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). We affirm.

On August 4, 1992, police officers from the City of Romulus observed various transactions taking place at defendant's residence. Numerous persons were seen entering the home, remaining for a minute or two, and then leaving. The officers also observed a narcotics transaction taking place in a car outside the premises. On the basis of these observations, they obtained a search warrant.

In executing the search warrant, the first officer to the front door knocked, and several officers then announced their presence as police officers. Within five seconds of knocking and announcing, the officers entered the residence. As a result of the search, defendant was arrested and charged with possession with intent to deliver marijuana.

On September 18, 1992, defendant filed a motion to suppress evidence, arguing that the officers executing the search warrant failed to comply with the Michigan knock-an-announce statute. MCL 780.656; MSA 28.1259(6). Officer Brandemihl testified at the suppression hearing that he heard nothing from the inside of the residence before gaining entry. He further testified that, in his experience, narcotics traffickers usually possess guns in their homes, but that he did not have any firsthand knowledge concerning whether

any guns were in this residence at the time of the search.

After hearing the testimony and listening to arguments from both sides, the trial court granted defendant's motion to suppress, citing People v Polidori, 190 Mich App 673, 476 NW2d 482 (1991).

The people argue that the testimony at the suppression hearing, that the officers witnesses foot traffic at the residence and that weapons are usually present in the home of narcotics traffickers, justified the immediate entry into the home and that, therefore, this case can be distinguished from Polidori. We agree that strict compliance with the knock-and-announce statute may be excused if police officers have a basis to conclude that evidence will be destroyed or lives will be in danger by the delay. However, nothing in this case indicates that there was any evidence that drugs were kept in a manner that would

facilitate their immediate destruction or that these particular defendants possessed weapons. Without such evidence, there was no justification for the police to dispense with the requirements of the knock-and-announce statute. People v Marinez, 160 Ill App 3d 349, 353; 513 NE2d 607 (1987), cited with approval in Polidori, supra. We, therefore, are constrained to conclude that the police officers violated Michigan's knock-and-announce statute.[1]

Finally, the people argue that the exclusion of the evidence obtained by a valid search warrant for the premises was not the appropriate remedy. We would not conclude that a timing error in the execution of a valid search warrant offends the Fourth Amendment reasonableness requirement. However, in Polidori, this Court held that if the method of entry violates the knock-and-announce statute,

the exclusionary rule must apply. Consequently, we are compelled by Administrative Order No. 1990-6 to follow Polidori and conclude that the evidence recovered must be suppressed. Were it not for the administrative order, we would not require the evidence to be suppressed.

Affirmed.

WEAVER, J, concurred.

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1. The dissent endeavors to read Polidori as not requiring application of the exclusionary rule to violations of the knock-and-announce statute. It is clear, however, that when the Polidori opinion is read as a whole, the Court concluded that the exclusionary rule must be applied to such violations unless there is a basis for concluding that the officers' conduct was reasonable under the circumstances, such as the existence of exigent circumstances or heightened danger to the officers. The dissent points to no such circumstances in this case.

H.R. GAGE, J.(dissenting). I agree with the majority's recitation of the facts and with the conclusion that the evidence

supported the finding that the execution of the search violated the so-called knock-and-announce statute. MCL 780.656; MSA 28.1259(6). I respectfully dissent from the majority opinion because I do not read People v Polidori, 190 Mich App 673; 476 NW2d 482 (1991), as requiring suppression for every violation of the knock-and-announce statute. Furthermore, I would not find that suppression is required in this case.

MCL 780.656; MSA 28.1259(6) permits an officer to break the door or window of a building to execute a warrant if, after notice of his authority and purpose, he is refused admittance. The statute does not provide for suppression of evidence seized in noncompliance with the statute is punishable as a misdemeanor. MCL 780.657; MSA 28.1259(7).

The majority find that, "in Polidori, this Court held that if the method of entry

violates the knock-and-announce statute, the exclusionary rule must apply." Ante, at 624; emphasis added. In Polidori, supra at 677, this Court held:

> Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness if also offended. (Emphasis added).

In Polidori this Court further observed that a violation would be excused for reasonable cause or exigent circumstances.

In Polidori, this court discussed exigent circumstances in light of People v Gonzalez, 211 Cal App 3d 1043, 1048; 259 Cal Rpt 846 (1989), and People v Marinez, 160 Ill App 3d 349, 353; 513 NE2d 607 (1987). Illinois and California have adopted rules that require suppression of evidence sized during a search where there are knock-and-announce violations, except where the state can show 'exigent

circumstances.' In these states, 'exigent circumstances' have been limited to circumstances where the police have specific information that the narcotics would be immediately destroyed or reason to believe that weapons would be used against them. Id. The Polidori panel could have explicitly adopted a similar rule of suppression. It did not. Rather, it cited broader principles of Fourth Amendment reasonableness as the test for whether a knock-and-announce violations requires suppression.

The touchstone of any search and seizure analysis is reasonableness. Florida v Jimeno, 500 US __; 111 S Ct 1801; 114 L Ed 2d 297 (1991). in Bell v Wolfish, 441 US 520, 559; 99 S Ct 1861; 60 L Ed 2d 447 (1979), the Court stated:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. E.g., United States v Ramsey, 431 US 606 (97 S Ct 1972; 52 L Ed 2d 617)(1977); United States v Martinez-Fuerte, 428 US 543 (96 S Ct 3074; 49 L Ed 2d 1116)(1976); United States v Brignoni-Ponce, 422 US 873 (95 S Ct 2574; 45 L Ed 2d 607)(1975); Terry v Ohio, 392 US 1 (88 S Ct 1868; 20 L Ed 2d 889)(1968); Katz v United States, 389 US 347 (88 S Ct 507; 19 L Ed 2d 576 (1967); Schmerber v California, 384 US 757 (86 S Ct 1826; 16 L Ed 2d 908 (1966).

Considering these factors, there was no evidence that the scope of the intrusion exceeded the scope of the warrant. The warrant was limited to a search of the residence for contraband and that proceeds thereof. There was no evidence that the manner of the search violated any laws other than the misdemeanor knock-and-announce statute. There is no

evidence of any abusive or oppressive conduct by the police during the search. The search was conducted during the daytime hours. The justification for the search was the warrant based on an affidavit. The search was conducted at defendant's home.

The fact that the search was conducted at defendant's home merits heightened scrutiny. However, except for the violation of the statute, none of the facts of this case would support a conclusion that the search was unreasonable.

For the above reasons, I would reverse and remand for further proceedings.

APPENDIX B:
ORDER OF MICHIGAN SUPREME COURT

ORDER
Entered: June 21, 1994

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v SC: 99032
COA: 158306
KATHLEEN ASHER LC: 92-9680
Defendant-Appellee

On order of the Court the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Mallet, Jr., J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 21, 1994 /s/Corbin R. Davis
Clerk

APPENDIX C: PEOPLE V POLIDORI

DOCKET NO. 133018. Submitted may 14, 1991, at Detroit. Decided August 19, 1991, at 9:25 a.m. Leave to appeal sought.

Before: CAVANAGH, P.J., and NEFF and W.R. BEASLEY, JJ.

CAVANAGH, P.J. Defendant is awaiting trial on a charge of possessing with the intent to deliver a controlled substance in an amount of 50 grams or more, but less than 225 grams, MCL 333.7401(2)(a)(iii); MSA 14.15(7401(2)(a)(iii), pending our disposition of the present appeal. Defendant claims that the trial court erred in deciding that suppression of the evidence was not the appropriate remedy for a violating of Michigan's knock-and-announce statute, MCL 780.656; MSA 28.1259(6). We agree with defendant and reverse the decision made below.

According to the evidence submitted at the suppression hearing, police officers obtained a search warrant for defendant's

home after successfully completing a controlled "buy." On November 9, 1989, at approximately 7:00 p.m., four or five police officers in plain clothes armed with rifles arrived in an unmarked van at defendant's home. Within six seconds of knocking and announcing their presence, the police officers forced their way in with a battering ram.

Defendant moved for suppression of the evidence seized in his home, arguing that the police officers did not allow a reasonable time for the occupants to answer the door. Relying on People v Harvey, 38 Mich App 39; 195 NW2d 773 (1972), and People v Doane, 33 Mich App 579; 190 NW2d 259 (1971), rev'd 387 Mich 608; 198 NW2d 292 (1972), defendant insisted that, to comply with the statute, the police officers had to knock, announce their presence and purpose, and wait long enough for the occupants to reach the door from

the room farthest away.

In deciding defendant's motion, the trial court agreed that the knock-and-announce statute had been violated by the conduct of the police officers because, absent any exigent circumstances, a forced entry after a three-to six-second wait did not substantially comply with the statute. However, the trial court also ruled that the 'the search and seizure was not constitutionally invalid but rather was merely statutorily illegal.' Consequently, the trial court refused to apply the exclusionary rule.

The trial court further relied on the fact that the statute provided its own remedy in case an officer wilfully exceeded his authority. See MCL 780.657; MSA 28.1259(7). The court concluded that the deterrent aim of the exclusionary rule would not be properly served by suppressing

the evidence because there was a statutory remedy available if the officers wilfully violated the statute. It is with the trial court's ruling with respect to the application of the exclusionary rule that we disagree.

US Const, AM IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitution does not forbid all searches and seizures, only unreasonable ones. Harris v United States, 331 US 145, 150; 67 S Ct 1098; 91 L Ed 1399 (1947). Consequently, the lawfulness of a search or seizure will depend upon its reasonableness. Ker v California, 374 US 23, 32; 83 S Ct 1623; 10 L Ed 2d 726

(1963); People v Orlando, 305 Mich 686, 690; 9 NW2d 893 (1943). Because there is no formula for the determination of reasonableness, each case must be decided on its own facts. Go-Bart Importing Co v United States, 282 US 344, 357; 51 S Ct 153; 75 L Ed 374 (1931).

MCL 780.656; MSA 28.1259(6) provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

Although there is no Michigan case that directly deals with the sanction that should follow a violation of the knock-and-announce statute, we agree with a number of other jurisdictions that the requirement that officers identify themselves and state their authority and

purpose before entering a private residence has its roots in the Fourth Amendment. See People v Gonzalez, 211 Cal App 3d 1043, 1048; 259 Cal Rptr 846 (1989), Tatman v State, 320 A2d 750,751 (Del, 1974), Commonwealth v Chambers, 385 Pa Super 605, 610, 561 A2d 1257 (1989), lv gtd 523 Pa 647; 567 A2d 650 (1989), and State v Carufel, 112 RI 664, 668, 314 A2d 144 (1974).

Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended. See Ker, supra, at 47. Because the primary purpose of the constitutional guarantee is to prevent unreasonable invasions, if a police officer has reasonable cause to enter a dwelling to make an arrest, his entry and search are not unreasonable. Ker, supra, at 39, relying on People v Maddox, 46 Cal

2d 301, 306; 294 P2d 6 (1956). If the police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute may be excused. Similarly, if events indicate that compliance with the statutory requirements would be a useless gesture, the requirement that police officers wait for admission may also be excused. Gonzalez, supra, at 1048.

For example, in People v Marinez, 160 Ill App 3d 349, 353; 513 NE2d 607 (1987), the court concluded that the information acquired by the police officers 'was insufficient to supply the requisite exigent circumstances which would permit them to dispense with the knock and announce rule.' There was no proof that the evidence sought to be seized was kept in a place that would facilitate its destruction. Nor was there any indication

that the occupant was armed. Without more, there was no justification for the conduct of the police.

In this case, we believe that the search and seizure was constitutionally invalid, not merely statutorily illegal. There is no claim that a search carried out in compliance with the statute would have resulted in the destruction of the evidence, increased the danger to the police officers, or been a useless gesture. Under these circumstances, we can only conclude that the officers acted unreasonably when they executed the search warrant. Because there was no evidence introduced at the suppression hearing to justify the simultaneous forced entry of defendant's home, we can find no reason to excuse the police officers from complying with the requirements of our knock-and-announce statute.

With respect to the influence of the

statutory remedy on our analysis, we do not agree that the existence of that remedy precludes application of the exclusionary rule. There can be no dispute that evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule. Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

Reversed

NEFF, J., concurred.

W.R. BEASLEY, J., concurred in the result only.